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THE ARMED FORCES AND THE TRIAL OF WAR CRIMINALS

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10 August 1943

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FOREWORD

It is realized that not all the problems of law and policy relative to the punishment of war criminals are treated here. The gaps result in part from the fact that, in general, this study concerns itself with the issue only from the point of view of the Armed Forces. In the second place, it has not been considered advisable to enter upon certain detailed questions of procedure, such as the precise form of an international military tribunal, until decision has been made upon general lines of policy. The present study is designed merely to provide information and principles that may be of assistance in the initial outlining of a systematic treatment of the issue of war criminals.

10 August 1943.

SUMMARY

The following are the principal proposals presented and discussed:

I. Jurisdiction over war criminals

1. Articles of capitulation should stipulate the surrender of war criminals and of documents needed for their conviction.

2. The demand for war criminals should provide for their surrender as prisoners of war, - a status which will remove all technical obstacles to their trial before military tribunals.

3. Exceptions should be made of those accused of war crimes in any agreement for general release of prisoners of war.

4. If there is no written instrument of capitulation, a proclamation should be issued by occupying armies, naming wanted criminals and demanding the assistance of the population in their apprehension.

5. The names of wanted war criminals should be submitted to all neutral countries with the warning that in the event of their escape extradition will be sought.

II. Type of court to be used for trial

1. Trial by municipal courts under municipal law is objectionable because of the inadequacy of present municipal law in most countries and the legal objection to altering it to fit the need by ex post facto legislation.

2. Analogous objections apply to the creation of a special international political tribunal.

3. The creation of an international military tribunal, with regional branches, to operate before formal conclusion of peace, is probably the most practicable answer.

a. It should be used at any rate for cases involving offenses against the nationals of more than one country.

b. The President of the United States, under his war powers, may authorize U.S. participation.

4. The creation of this tribunal should be accompanied by a United Nations agreement as to a code of laws and procedures. This code should be based as far as possible upon features common to the various national codes.

III. Changes in manuals of the laws of warfare

Both the British and the American manuals of the rules of warfare contain passages which seem to legalize many of the practices for which the Germans have been condemned. For example:

a. Individuals are held not responsible for illegal acts which their superior officers order them to commit.

b. Hostages may be taken as insurance against unlawful acts and put to death if these acts are committed.

c. Collective punishment for purely individual misdeeds may be inflicted either in the form of fines or otherwise.

These tenets are not in accordance with preponderant sentiment in international law. They should be amended.

IV. War criminals and psychological warfare.

1. The code of laws by which war criminals are to be tried should be published at the earliest opportunity.

2. Notice should be given that not only those who originate unlawful orders, but also those who, knowing them to be unlawful, execute them, will be held responsible.

3. Notorious war criminals captured before the close of hostilities should be tried at once.

I. THE ARMED FORCES AND THE TRIAL OF WAR CRIMINALS:

GENERAL DISCUSSION

There seems to be a growing realization that the promised trial of Axis war criminals raises highly difficult problems both of policy and of law and that, if the fiasco which was made of the punishment of German war criminals in the First World War is to be avoided, these problems must be carefully studied and solved well in advance of the termination of hostilities. This view was evidenced in several recent debates in the House of Lords, and, on 18 May 1943, in the United States House of Representatives, where a resolution was introduced by Representative Celler empowering the House Judiciary Committee to "examine into the trial and punishment of the Axis war criminals,...the mode of judicial approach for the prosecution of such offenses...the possibility of the adoption of a code of national or international laws to be applicable to the cases when tried." (H. Res. 241.)

What is, perhaps, insufficiently realized is that important phases of the issue touch upon the responsibilities of the Armed Forces, whose viewpoint, therefore, should be given its due weight in the further elaboration of policy. While plans can be made only within the framework set by political authorities, thus far the American Executive's declarations of policy, and, indeed, those of United Nations statesmen in general, have concerned themselves only with the broadest generalities. President Roosevelt has made it clear only that war criminals "shall have to stand in courts of law in the very countries which they are now oppressing," that the United Nations do not plan "mass reprisals" but rather punishment of "the ringleaders," and that the surrender of war criminals will be demanded at the close of the war in accordance with evidence compiled by the United Nations Commission for the Investigation of War Crimes. (Declarations of 25 October 1941, 21 August 1942, 8 October 1942, etc.) The important questions which remain are apparently left unsettled because they must be studied carefully in the light of technical considerations. They concern the Armed Forces not only because of their important role in the execution of policy, but also because the formulation of policy must take into account factors of military interest or of military law.

The capture of guilty enemy leaders, individually or in large-scale capitulations, raises for military authorities immediate problems of procedure. So too does the bearing of the war-criminals issue upon psychological warfare, which may be hampered or greatly assisted by the manner in which United Nations policy is promulgated. A problem of the future which must immediately be studied is the incorporation of effective stipulations, bringing about jurisdiction over war criminals, in the articles of capitulation to be imposed upon the defeated armies. Most important of all, the crimes for which Axis authorities have been impugned are violations of the laws of warfare, punishment of which has devolved traditionally upon military tribunals. Whatever type of court is used, however, the relevance of the laws of warfare places upon the Armed Forces the responsibility of assisting in the preparation of legally tenable grounds of indictment and modes of procedure. It also becomes their duty to determine whether their manuals of the rules and regulations of warfare clearly proscribe, in accordance with international law, the practices for which Axis leaders are to stand trial.

Legal problems arising in connection with these issues are discussed in detail in later chapters while a general discussion of the issue, centering in specific proposals, appears in the following pages.

A. The obtaining of jurisdiction over war criminals

President Roosevelt's statement of 8 October 1942, indicates clearly that "provision for the surrender to the United Nations of war criminals" will be made in the agreement signalizing "the successful close of the war". Both legal and practical problems remain to be solved, however, if the difficulties of obtaining jurisdiction experienced in the last war are not to repeat themselves. The anarchic conditions which may render surrender of the war criminals difficult must be foreseen and appropriate stipulations must be made to enable United Nations authorities to take necessary action in intervention. It is also necessary to frame the provisions in a manner permitting the courts of the United Nations to assume jurisdiction in accordance with international law as well as municipal law. The possibility of an absence of any formal armistice or capitulation must be envisaged and plans made for unilateral action in the apprehension of war criminals. Another contingency that must be prepared for is their escape to neutral countries; appropriate measures will be required to obtain the cooperation of these countries.

PROPOSALS

1. The articles of capitulation should stipulate the surrender of war criminals, both members of the armed forces and civil functionaries.

2. This surrender should not be demanded as a prior condition of the termination of hostilities--a demand which might delay peace through the practical difficulties of complete fulfillment.

3. The articles should also stipulate the delivery of documents and the furnishing of evidence needed for the conviction of war criminals.

4. Those whose guilt has already been evidenced should be specifically named and it should be provided that those whose guilt becomes apparent later will likewise be surrendered upon demand.

5. The demand for war criminals should provide for their surrender as prisoners of war -- a status which will remove all technical obstacles to their trial before the United Nations military tribunals.

6. Because a peace treaty has the effect of terminating the right to try prisoners of war unless it is otherwise stipulated, the articles of capitulation should reserve the right to try war criminals after the conclusion of peace if necessary.

7. If there is any provision for the general return of prisoners of war, reservation should be made of the right to keep and try those prisoners in the hands of the United Nations who are accused of war crimes.

8. It should also be stipulated that those who later fall into the hands of the United Nations armies through military occupation may, if deemed guilty of war crimes, be placed on trial.

9. If military occupation of enemy territory is only partial, it should be provided that, in the event the enemy authorities are unwilling or unable to apprehend and surrender war criminals, the United Nations may intervene to the extent necessary to obtain possession of their persons.

10. If there is no written instrument of capitulation but merely a unilateral assumption of military government, an ordinance issued to the enemy population should name wanted criminals and demand the cooperation of the population in their apprehension.

11. The names of those accused of war crimes should, as soon as the course of hostilities makes their flight a likelihood, be communicated to all neutral governments with the warning that in the event of their escape extradition will be sought. The prior negotiation of extradition arrangements with these governments would be desirable if possible.

B. The type of court and time of trial

The legal difficulties surrounding the issue make it highly important to select the type of court which gives greatest assurance of competence of jurisdiction and adequacy of judicial criteria. Certain kinds of courts have systems of law which were not designed for punishment of an enemy's war crime in foreign territory; assuming the fairness of judicial procedure such courts would be compelled to refuse jurisdiction or to give verdicts of acquittal. In most countries municipal courts could not without special legislation take jurisdiction over crimes committed against their nationals in a foreign country; thus the United States municipal courts would be lacking in jurisdiction over crimes against Americans that had occurred in Germany or German-occupied Europe. Legislation conferring additional jurisdiction could not be applied to crimes committed before its enactment inasmuch as municipal law generally regards ex post facto penal laws as invalid. To escape this technical difficulty some have proposed an international political tribunal, but this unprecedented type of court could only be created with considerable procedural difficulty and at the risk of strong opposition from those who dislike departure from established systems of law. The military tribunal, an established institution designed for this very issue, and ready to function directly after or even prior to the cessation of hostilities, would meet the need both legally and practically. But many circumstances, especially the fact that the crimes so frequently were committed against the nationals of several countries, make it desirable at least in such cases that the national tribunals of the United Nations should not act separately. The creation of an international military tribunal, such as was contemplated by the Treaty of Versailles (art. 229), thus seems especially desirable in the present circumstances. This novel type of tribunal, however, raises a number of procedural problems which require solution.

PROPOSALS

1. An international military tribunal, composed of all United Nations or as many as are willing to participate, should be set up to serve at least in cases involving unlawful orders carried out in all theaters of operation, or offenses committed directly against nationals of more than one country, or offenses against the stateless.

2. This tribunal should be formed either by union of the military tribunals of the various United Nations or by the aggregation of their representatives.

3. The President of the United States may under his war powers, by executive agreement, authorize the participation of the United States in an international military tribunal -- a project assented to in 1919 by the American representatives on the Allied Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties.

4. The creation of the international military tribunal should be accompanied by a United Nations agreement as to code of laws and procedure.

5. The international code of procedure should be arrived at through adapting as much as possible common features of the various national codes.

6. The international code of the laws of warfare should represent a current consensus of the United Nations as to the implication of pertinent international treaties and customary international law; this consensus should not be prejudiced by erroneous interpretations which may be found in some of the existent national manuals.

7. The countries which wish may use their own tribunals for the trial of those who have offended only against their own nationals.

8. The international tribunal, however, could be recommended for all cases because it best embodies the principle of United Nations solidarity, obviates conflicting claims as to national jurisdiction, and eliminates the difficulties presented by tenets in certain of the national manuals of the laws of warfare.

9. For cases which pertain to particular regions, branches of the international tribunal should be set up in the various areas where crimes have occurred; thus speed of action and ease of collecting evidence would be best promoted.

10. For psychological as well as legal reasons it should be aimed to hold trials prior to the formalization of peace -- as soon as possible after unconditional surrender or the actual termination of hostilities.

C. Changes in manuals of the laws of warfare

Whatever type of tribunal is employed, considerable influence would be exerted by the manuals of the laws of warfare used in United Nations armies. Some of the national manuals contain tenets which might make it difficult or impossible to secure conviction of those tried for the most systematic and notorious of the Axis war crimes. It is unwarranted to make

changes merely to facilitate prosecution, but these tenets appear to be contrary to the preponderant opinion in international law outside of limited military circles. It is important that the manuals of the various United Nations should promptly be examined with a view to eliminating doctrines without warrant in international law which would embarrass the prosecution of Axis war criminals. The current United States Manual of the Rules of Land Warfare, FM 27-10, contains three tenets which, taken in their letter rather than their spirit, could be cited by Axis war criminals as sanctioning their acts. In later chapters it is demonstrated that they are not in conformity with international law, the original view of American military authorities, or the concepts of justice espoused currently by the Government of the United States.

PROPOSALS REGARDING FM 27-10

1. Elimination of the following sentences of par. 347, which would tend to absolve all war criminals except the few supreme authorities who have originated the unlawful orders:

"Individuals of the armed forces will not be punished for these offenses [against the laws of warfare] in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

2. If the above-mentioned deletion cannot be effected there should, at least, be issued a supplementary interpretation of the paragraph which makes it clear that it is inapplicable to soldiers whose country's military penal code, like that of Germany and Italy, enjoins them to disregard obviously unlawful superior orders.

3. Elimination of the following sentence from par. 358 d, which, though doubtless intended only for the most extreme emergencies, seems to sanction a practice that the Germans have used systematically in terrorization:

"Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed."

4. Elimination of the following sentence from par. 358 e, which is in conflict with the most common understanding of Hague Convention IV, article 50:

"Collective punishments may be inflicted either in the form of fines or otherwise."

(Replacement of the above by the words of the U.S. Manual of 1914, par. 386:

"Collective punishments may be inflicted for such offenses as the community has committed or permitted to be committed.")

5. Elimination of par. 344, which also legalizes the imposition of collective punishments upon the innocent by way of reprisal.

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D. The war criminals and psychological warfare

Official declarations on the issue of war criminals serve two purposes: first, the threatening of sanctions to discourage Axis authorities from persistence in their crimes; second, the satisfaction of the demand for retributive justice among the peoples of the United Nations, especially those of the occupied countries. Statements with these aims have thus far been made only by political authorities; proposals below are concerned to indicate possibilities which the issue holds for the military authorities as well. There are occasions on which public declarations may come most appropriately and with greatest effectiveness from the military leaders of the United Nations, acting individually or collectively. Such occasions are likely to multiply as the United Nations armies undertake invasion of the Axis-occupied countries and witness an intensification of unlawful terrorism against their populations.

PROPOSALS

1. If, as is suggested above, an international military tribunal is created before the close of hostilities, the code of the laws of warfare agreed upon should be made public as a statement of the misdeeds which Axis authorities must avoid if they wish to escape punishment.

2. Either upon the occasion of announcing this code, or on a different occasion, notice should be given that the United Nations will hold responsible not only those originating unlawful orders, but also those who, with knowledge that they are unlawful, perpetrate them; in this connection reference should be made to the provision in the military penal code of the Axis nations that soldiers are not required to carry out unlawful superior orders.

3. Following the model of General Botha in the World War I, who warned an enemy commander that he would be held personally responsible if he persisted in the poisoning of wells, warnings against continued illegalities perpetrated upon our own Armed Forces or the people of occupied territories should be addressed upon appropriate occasions to the responsible enemy authorities.

4. If enemy leaders guilty of especially flagrant war crimes should be captured prior to the close of hostilities, they should be made to stand trial before military tribunals immediately as an augury of the general prosecution to ensue later.

II. THE PROBLEM OF THE TYPE OF COURT

The United Nations commitment to punish Axis war criminals may impose responsibilities of execution upon the Armed Forces not only after the Armistice but even in the course of current hostilities if some of the guilty are taken as prisoners of war. Moreover, the further elaboration of the substance of the policy may, within the framework allowed by political decisions, be guided by knowledge and experience relative to punishment of offenders under the laws of war.

Realization that procedure must be outlined in the Armistice has already accelerated reflection, and in a few respects there is a definite advance beyond the vagueness with which the policy was first formulated. On 8 October 1942, President Roosevelt declared that the close of the war would include provision for the surrender of war criminals, that meanwhile a United Nations Commission would collect evidence against them, and that this evidence would be used not for mass reprisals but rather for punishment of ring-leaders. Simultaneously, the British Lord Chancellor spoke to the same effect and warned especially against repeating the mistake of 1918 in not settling the matter of war criminals in the Armistice.

The Lord Chancellor statement was in response to a House of Lords debate on war criminals (7 October 1942) in which most speakers seemed to feel that the greatest problem was that of the type of court and of law to be used. On this issue the Lord Chancellor expressed no opinion--an omission fortunate in so far as it avoided over-hasty settlement of a difficult question. President Roosevelt has declared only that the guilty would "stand in courts of law in the very countries which they are now oppressing" (21 August 1942). In his statement of 14 October 1942, Commissar Molotoff advocated "a special international tribunal". Both these proposals, however vague, avoid the error made by former Allied statesmen when they yielded to Germany's insistence that war criminals be tried not before military tribunals of countries whose nationals had suffered, as the Peace Treaty stipulated, but in her own courts. Only the smallest proportion of the cases came to trial, and in these, even where the accused were found heinously guilty, police-court sentences were imposed.

But it was recognized generally in the House of Lords debate that there are serious legal difficulties in convicting the guilty even in the courts of the victors. The great danger, indeed, exists that condign punishment will be frustrated by technical obstacles arising from the attempt to apply some system of law which was not designed for this issue, or which was designed for it under conditions vastly different from those of the current war. It is desirable well in advance to envisage all possible judicial procedures, to ascertain the difficulties inherent in each, to reject those where the obstacles are insuperable, and to discover and buttress with the best legal arguments a procedure which is feasible. Even a cursory and entirely preliminary inquiry such as the following may be useful in emphasizing this important consideration.

1. Municipal civil courts. These courts, trying offenders against persons of the same nationality,

would apply whatever municipal statutory enactments against penal crimes, such as murder and theft, have a form which would cover offenses committed by enemy persons against nationals in foreign as well as domestic territory. But in consequence of the territorial principle of jurisdiction, which bounds the general scope of legislation in all but a few countries, penal enactments now existing ordinarily limit the jurisdiction of civil courts to offenses committed within the nation's own territory. Special legislation, as in the American counterfeit laws, would be needed to establish jurisdiction over crimes committed against nationals in foreign territory. But such legislation would be inapplicable to the current war because of the principle of common law prohibiting retroactiveness. In American law nullum crimen, nulla poena sine lege takes an especially stringent form, expressed in the dictum of Supreme Court Justice Johnson in 1812 that "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." (7 Cranch, 34.)

Another difficulty in municipal law--one which would prevent the punishment of the arch-criminals--is "the exemption of the person of the sovereign from arrest or detention within a foreign territory" (Marshall, 7 Cranch, 137). In United States courts this theory has been applied even to ex-sovereigns so far as concerns acts performed in their sovereign capacity. Messrs. Lansing and Scott cited it in dissenting from their colleagues on the Peace Conference Commisssion in the issue of bringing to trial the Kaiser.

2. National military tribunals. The fact that these tribunals apply the common law of war as established by treaties and customs obviates difficulties of municipal civil courts. Offenders can be tried regardless of the scene of the crime and irrespective of the absence of previous statutory designation of specific penalty and procedure. In the United States, for example, Congress, through the Articles of War, especially Article 15, has authorized the trial by military tribunals of offenders against the laws of war, subject only to constitutional limitations. Moreover, "military jurisdiction...is not limited by the usual immunities of sovereigns." (Quincy Wright, A.J.I.L., XIII, 125.) Although punishment under the laws of war must ordinarily cease with the restoration of peace, this principle will not hold when the armistice or the peace treaty specifically provides for subsequent trial. The laws of war as set forth in the Hague Conventions of 1899 and 1907, together with customary international law, which the Conventions recognize, provide ample ground for punishment of the cruelties perpetrated by Axis nations in occupied territories, as well as of other misdeeds.

The difficulty is, however, that the laws of war are generally applied as interpreted in national manuals which, in accordance with the Hague Conventions, governments issue as instructions to their armies. These manuals all incorporate the humane Hague provisions but they sometimes include also conceptions which, while always alleged to be in conformity with preponderant usage and juristic opinion, are in conflict with them, and are motivated really by the desire of military authorities to safeguard military discipline or leave loopholes for severe measures in emergencies. While doubtless intended to be applied with reason and all due restraint, yet some of these rules, taken in their letter rather than their spirit, could be used to defend successfully

many of the crimes for which Axis leaders have been arraigned. Such difficulties are discussed in detail in later chapters but may here be briefly noted.

The greatest obstacle is in the following provision, which, suggested by the British manual, crept into the American field manual in 1914 and was repeated in the 1940 edition (par. 347):

> Individuals of the armed forces will not be punished for these offenses /against the laws of warfare/ in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

This tenet was doubtless asserted upon the assumption that offenses would be sporadic and individual, and not, as in the German army of today, systematic and ordered by the highest authorities. The provision would not prevent the punishment of certain of these (unless, indeed, orders from the Führer could be demonstrated) but it would save numerous high commanders and other officials whom it can scarcely be desired to see absolved. The January 13, 1942 declaration of nine occupied countries called for the punishment of "those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them." That superior orders should shield those guilty of deeds known by them to be illegal is not in accordance with American municipal law (Cf. Marshall, 2 Cranch, 170), and, in international law, "the rule does not represent any decided weight of opinion outside of military circles." (G.A. Finch, A.J.I.L., XV, 441.)

Another provision of the American manual could be cited in defense of those guilty of "the practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans" which President Roosevelt stigmatized (8 October 1942). Speaking of the lawfulness of "appropriate" reprisals, the 1940 manual states:

> Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed. (Par. 358.)

In this case the British manual (pars. 461-64) says nothing to support the tenet. Garner (International Law and the World War, I, 310) declares that, inasmuch as practically all modern writers are agreed that hostages are entitled to be treated as prisoners of war, "they cannot...be put to death or subjected to other severities than those which may be lawfully inflicted upon regular military prisoners."

A different issue is that of the collective penalties which it is the German practice to impose. The current American manual (par. 343) cites on this question the Hague article 50 that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible." But it adds (par. 344) that the "above article does not prevent reprisals" and refers the reader further to par. 358 which sanctions as a reprisal precisely

what previously had been forbidden. Par. 358 e, in conflict with the most common interpretation of the Hague article 50, declares that "collective punishments may be inflicted either in the form of penalties or otherwise. The British Manual of Military Law is to the same effect. (Par. 458.)

But even should all such tenets be eliminated from the national manuals, the use of national military tribunals alone seems precluded by a difficulty that is insuperable. It is the fact that so many of the Axis war crimes were committed against the nationals of several nations simultaneously, as in the treatment of prisoners of war, or resulted from orders which were to be carried out in all theaters of war. The issue of crimes against the stateless can also not be overlooked. It is possible, moreover, that certain of the exiled governments will be unable for some time to reestablish the necessary judicial machinery, military or civil.

5. An international political tribunal. This type of tribunal, which was contemplated for the trial of the Kaiser by the Versailles Treaty (art. 227), would impose penal sentences for a much broader range of offenses than those that civil or military tribunals may punish. These offenses would include not only ordinary penal crimes and violations of the laws of warfare but also infractions of political morality, such as resort to aggressive war and the violation of treaties. (Cf. the Allied Declaration on German War Crimes by Nine Occupied Countries, 13 January 1942, which proposes to punish "political offenses" as well as war crimes.) In the broadest sense, the laws applied by the international political tribunal would be "the laws of humanity." This kind of tribunal and law is advocated by those who would escape from all the technical difficulties involved in positive law. Yet it is doubtful whether at least one of these difficulties would not reassert itself at the prompting of mere equity--the principle excluding punishment on the basis of ex post facto legislation. Because of this principle Messrs. Lansing and Scott, as well as the Japanese delegates, vigorously objected to the proposed recommendation of an international penal tribunal by the Commission on Enforcement of Penalties. The same type of opposition would be felt and expressed today by those who believe that the punishment of the lawless should take place through upholding and not suspending the traditional procedures and principles of law. Moreover, there exists at present neither a substantive penal law nor an authorized tribunal for international criminal proceedings. (Cf. George Manner, A.J.I.L., XXXVII (1943), 425-32.) Their creation would entail considerable time and great difficulties in arriving at international agreement. In the United States the innovation would doubtless appear so great as to require the concurrence of the Senate, which, after long debate, might or might not be obtained. According to newspaper reports of a British note of November 1942 to the various United Nations, the British Government has advocated trying war criminals on the basis of the laws of war rather than special legislation.

5. An international military tribunal. The American representatives on the cited Peace Conference Commission of 1919 conceded, despite their extreme legal cautiousness, that "acts involving more than one country.... could be tried by a tribunal made up of the competent /military/ tribunals of the countries affected or of a commission thereof possessing their authority." (A.J.I.L., XIV,

146-7.) This proposal was adopted and appears in article 229 of the Peace Treaty although, due to Germany's obstructiveness, it was never carried out. In the present issue it could be adopted as a method supplementing the use of national military tribunals for cases involving only offenses against those of the same nationality as the tribunal.

In principle, however, the international military tribunal could be considered for all war crimes. It would have the advantage not only of indicating the world-wide import of the issue but also of preventing conflicting claims as to national jurisdiction. Messrs. Lansing and Scott did, indeed, maintain that "the United States could not institute a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war, unless such violations were committed upon American persons or American property." (Ibid., p. 147.) But this view does not seem a warranted inference from either international or municipal law. The former has generally been construed as authorizing the assumption of penal jurisdiction by belligerent armed forces over whatever offenders come within their power, regardless, as in occupied territory, of the nationality of the injured. Similarly municipal law, as exemplified by United States Article of War No. 15, does not restrict by reference to nationality the competency of military tribunals in respect to offenses against the laws of war.

The union of our military tribunals with those of the other United Nations, both in a general international tribunal and in branches thereof for various areas, could apparently be effected through either formal or informal Executive agreement. As the Supreme Court pointed out in the case of the German saboteurs, our Articles of War (12, 15) "recognize the 'military commission' appointed by military command." The Court added that "Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions." Congress, as is stated in an article of General Halleck on military tribunals, "has not defined or limited their jurisdiction." (A.J.I.L., V, 965.) Under his broad war powers the President, who creates and regulates such tribunals for trying offenses under the laws of war, seems to have as clear a right to unite them with those of other nations as to authorize participation in a joint council for military cooperation.

Such a tribunal could fulfil its object only if its creation were accompanied by a practical and enlightened consensus as to the laws of war. Specifically, two novel but well-authorized enterprises are required:

a. The traditional codes for administering the laws of war within the framework of national tribunals must be supplemented by a code of organization and procedure for an international military tribunal--a code which could be arrived at largely by adapting common features of the national codes. This innovation would not violate international law, which has always left the procedure for applying the laws of war to the initiative and judgment of nations, and which permits whatever it does not prohibit.

b. More important still, the substantive side of the laws of warfare must be determined upon the basis not of the divergent national manuals but rather of a current consensus as to what international treaties and the basic

principles of customary international law really require. The traditional tenets of a few or even of many nations, when found to be contrary to this consensus, should be abandoned. These revisions would not constitute a change of international law but rather a return to it.

Independently of these conclusions, the current United States manual, FM 27-10, should promptly be revised if it is wished to eliminate those dicta, which, though they are not called for by the laws of warfare or are in actual conflict with them, could be cited by Axis war criminals as an apparent justification of their misdeeds.

III. THE LEGAL BASIS FOR THE PUNISHMENT OF AXIS WAR CRIMINALS WHO PLEAD SUPERIOR ORDERS

No question is more important in the implementation of the United Nations program of trying Axis war criminals than that of finding a legal basis for the conviction of those who use the defense of action under superior orders. With the exception of the chiefs of state and of a few others who acted entirely upon their own malevolent initiative, probably all who are indicted will resort to this defense. It has in this case the specious force arising from the fact that the Axis war atrocities have apparently been ordered by the highest political and military authorities as a part of a systematic policy of ruthless terror towards the people of occupied countries. This assumption being granted, the conviction of the alleged criminals appears at first thought to be difficult or impossible in any fair following of the technical rules of law, such as civilized peoples, no matter what their moral prepossessions, always demand of themselves. One American jurist has indeed written that "the unqualified acceptance of the principle that a subordinate is not responsible for what he does under orders of his superiors will make it practically impossible to enforce proper penalties for violations of the laws of war." (George A. Finch, A.J.I.L., XV (1921), 445.)

The principle has by no means been accepted without qualification in all systems of law, but it is equally true that, however and wherever the war criminals may be tried, it seems at first appearance to be more or less of an obstacle. The difficulty will be least if trials be held in municipal courts, where, in most countries, the principle has never been accepted in unqualified form. In England and the United States in particular the opinion has generally prevailed in regard to their own armed forces that "when a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defense." (A. V. Dicey, The Law of the Constitution, 5th ed., p. 283.) Justice Marshall expressed the same view in 1804 in the case of the Flying Fish (2 Cranch 170). On the other hand, in neither British nor American municipal law is the concept of guiltlessness through superior orders uncontested. Lord Chief Justice Lee, giving the decision in the Alexander McGrowther case of July 31, 1746, declared that "the only force that doth excuse, is force upon the person, and present fear of death." (Michael Foster, Crown Cases, p. 14.) Apparently the soldier committing an unlawful act under superior orders can plead with preeminent justification that he is under such force in being threatened with death for disobedience. In the history of American municipal law Justice Story in 1827, Martin v. Mott, took the position that, immediate execution of orders being essential to military administration, the subordinate cannot pause to consider whether an order is or is not legally valid. Further, even those who deny that the superior order exculpates the subordinate often concede that it is a ground for mitigating the severity of the sentence. Thus Justice Stephen, while stating that "compulsion by threats ought in no case whatever to be admitted as an excuse for crime," adds that "it may and ought to operate in mitigating of punishment in most though not in all cases." (History of the Criminal Law of England, II, 108.)

There are, furthermore, countries whose penal code may be cited in support of the soldier pleading superior orders as an excuse for a war crime. Article 64 of the French criminal

code provides that an act committed by a person who has been constrained by force is neither a crime nor a misdemeanor. Although French military courts have not acted on the assumption that this article refers to the soldier, there are eminent French jurists, like Professor Nast of the University of Nancy, who have applied it to the military subordinate violating the laws of war under orders. (J. W. Garner, A.J.I.L., XIV (1920), 83.)

The difficulty raised by the superior orders plea in the case of military tribunals judging on the basis of the laws of warfare is considerably greater. The difficulty is greater because the two leaders of the United Nations have both issued manuals of the laws of land warfare in which the position is taken that superior orders absolve from punishment those of the enemy forces who have offended against these laws. The official British guide, Land Warfare, prepared by Edmonds and Oppenheim in 1912 and incorporated into the British Manual of Military Law, issued in February 1914, was the first to adopt this doctrine. Its counterpart was in the treatise of L. Oppenheim, International Law (1912) section 243, which stated: "Violations of rules regarding war are war crimes only when committed without an order of the belligerent government concerned." Oppenheim and Edmonds, in their contribution to the British Guide and Manual, wrote as follows:

> It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Governments or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter. (Par. 443.)

Shortly afterward the foregoing tenet was substantially copied in the Basic Field Manual of the Rules of Land Warfare, approved by the General Staff of the United States Army, and issued on 25 April 1914, for the information and government of the American armed forces. After specifying the offenses against the laws of warfare, paragraph 366 of this Manual states:

> Individuals of the armed forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they fall.

In the current edition of the United States Rules of Land Warfare (FM 27-10, issued on 1 October 1940) these words are repeated in paragraph 347. Similarly, the British Government adhered to the position taken in 1914, even refusing to hold the enemy commander sinking the Lusitania guilty of a war crime if he acted under superior orders. In the 1929 edition of the British Manual of Military Law it repeated the statement of the previous manual and has not since retracted it.

These seem to be the only instances in authoritative military commentary in which the doctrine of immunity through superior orders is favored. Prior to 1912 the doctrine had not been accepted even in Anglo-American military circles. The "Instructions for the Government of Armies of the United States in the Field", issued 24 April 1863, does not contain the tenet. In 1865 the trial of Henry Wirz, the Confederate commander charged with maltreatment of Union war prisoners, brought the doctrine into issue. The accused having pleaded that he had acted under superior orders, the Judge Advocate replied: "A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obey such an order and disastrous consequences result, both the superior and the subordinate must answer for it." (Scott's Dictionary, p. 267.) Wirz was convicted and executed. Despite the contrary tenet of the United States Field Manual of 1914, in the Washington Treaty relative to the use of submarines the United States agreed with other countries (though France's withholding of ratification prevented the treaty from coming into effect) to hold guilty submarine commanders violating its articles even though such commanders should be acting under superior orders. (Article 3.)

Criticizing severely the tenet upheld by Oppenheim and the British Manual, the British jurist, H. L. Bellot, declared in 1915 that he could find no older or other authority for it. (Grotius Society, Problems of the War, II, 46-7.) Similarly, G. A. Finch, writing on "Superior Orders and War Crimes" in 1921, asserted that the "new and untried" rule "does not represent any decided weight of opinion outside of military circles." (A.J.I.L., XV, 441.) Among the criticisms levelled at it was that of Coleman Phillipson in his International Law and the Great War (1915) to the effect that (pp. 260-21) "the successive shifting of responsibility would exculpate every one until we reached the ultimate cause -- in the case of Germany, let us say, for example, the Kaiser." Influenced by such attacks, Lauterpacht, in the most recent edition of the deceased Oppenheim's treatise (1940), definitely abandoned the doctrine upheld by the latter so long. "The fact," Lauterpacht declared, "that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent." (II, 453.) In the still more recent work of Georg Schwarzenberger, International Law and Totalitarian Lawlessness (1943), the admissibility of the plea of superior orders is made to depend entirely upon the criminal law of the captor state and it is pointed out that there is no accordance among the various systems of criminal law in regard to this issue. (Cf. p. 67; also p. 63, n. 2, for a bibliography of the rejection of the superior-orders plea.)

Without denial of either the partial juristic authority or the considerations of equity which underlie the doctrine of the American and British manuals regarding superior orders, it can, nevertheless, be maintained that the abandonment of the doctrine has in its favor an even greater weight of legal opinion and moral justice. On legal grounds the abandonment of the rule would be justified by its relative recency, its unusualness even in military practice, and its rejection by an apparent majority of juristic commentators, including the

current editor of the very jurist (Oppenheim) from whom Anglo-American military authorities derived the tenet. From the viewpoint of policy, it does not seem justifiable to sacrifice the discouragement of war crimes to the protection of the individual soldier. But even were the admissibility of the plea of superior orders abandoned it would still be possible to give due consideration, by means of the mitigation of punishment, to the private who acts without discretion and without knowledge that the order given him is unlawful. The elimination of the tenet from the American and British manuals to facilitate the prosecution of Axis war criminals would be subject to criticism only if, as is not the case, the rule were legally valid.

At the same time, it is necessary for those preparing for the forthcoming trials to reckon fully with the possibility that the two manuals will be left unchanged. In view of that contingency nothing is more important than a careful examination of the question whether the Anglo-American doctrine is, in fact as in first appearance, an insuperable obstacle to the conviction of war criminals acting under superior orders. The present memorandum is concerned chiefly to point out that the immunity allowed by the doctrine is by no means as broad as many have taken it to be. Those advocating the use of an international political tribunal on the assumption that the military tribunals of the United States and Great Britain are unable to convict war criminals have leaped too quickly to conclusions. A narrow construction of the legal tenet in question can, indeed, paralyze the military tribunals, but a narrow construction is in this case not a correct construction. In view of the fact that punishment of war crimes is a major purpose of any civilized country a correct interpretation of the superior-orders doctrine can only be one which imposes upon the defendant the fullest burden of proof that immunity is warranted by such facts as the spirit no less than the letter of the doctrine envisages.

In the first place, it must be made evident, upon grounds much stronger than the defendant's mere allegation, that superior orders to carry out the war crime did exist. Were an allegation to that effect sufficient scarcely any war criminal would fail to extricate himself. It should be taken into account, indeed, that the production of written orders from a superior is often impossible in the nature of things. But evidence of some character should be demanded except in cases where the authorization of certain measures from higher quarters is a matter of common knowledge. The defendant must prove not only that superior orders in the issue existed but also that they directed unescapably the measures which he took. The accused must not have exceeded the order that was given. He must also not have failed to exercise to the fullest, in the interest of lawful warfare, the discretion that was allowed him by the terms of the order. These considerations are pertinent especially, of course, to the cases of high-ranking officers with whom rests ordinarily a degree of discretion.

But, most important of all, even if a superior order clearly calling for the unlawful act can be proved it is by no means true that the accused is necessarily absolved. He is exculpated only if the superior order is legally binding; that is, the subordinate must be required by the law of his army to obey and must be under pain of punishment if he disobeys. The lawful superior order is always binding; the unlawful superior order, with which we are alone concerned, is or is not binding according to the military law that is in question.

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This aspect of the superior-orders issue may easily be overlooked because of the common assumption that all soldiers are under an absolute duty of obedience to superior orders, lawful or unlawful. It is quite true that, the success of military operations being dependent upon hierarchy and stringent obedience, nearly all military codes state the soldier's duty of obedience with such great emphasis as to make this duty seem, at first thought, unqualified. But a qualification, however narrow, becomes necessary through the fact that a military organization can only fulfil its function by accordance also with another principle, that of obedience to the legal system. In its relation to the civil authorities the army must obey the general law of the state, and, in relations internal to the army, soldiers must obey the law that the army has set up for its own government with the sponsorship of the state. When superior officers give orders that are unlawful a conflict is introduced between the two principles of soldierly obedience, and, in this case, the soldier is released by most military penal codes from his otherwise absolute duty of obedience to superiors. The exception is usually formulated to the effect that a soldier is not subject to punishment for disobedience to superior orders that are obviously unlawful -- a disobedience which, by implication, becomes his duty or at least his liberty. (Cf. Alfred Verdross, Die Völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten, 1920, pp. 48-55.) Such a sanction of exceptional disobedience is not considered dangerous because it is assumed that obviously unlawful orders will not often be given, and that even less often will a soldier take the responsibility of deciding that an order is unlawful when he faces punishment should his decision be incorrect. The United States Article of War No. 64, for example, qualifies the soldier's duty of obedience as follows: "If an order is palpably contrary to the laws and usages of military service, the fact that it was given by a superior to a subordinate does not justify the subordinate in carrying it out."

The relevance of such stipulations to the issue of war crimes becomes clear only in the light of the scope of unlawful orders. If they included only those commands which have been banned from the point of view of state interest the issue of crimes against an enemy people would not be affected. But it is usually the case that the common law of warfare, prohibiting unnecessary cruelty to the enemy, has been made part of the law of the land by general declaration or by ratification of the Hague and other international conventions. Moreover, like the United States War Department, the military organizations of other great powers have incorporated the humane provisions of these conventions into the manuals which, in accordance with the Hague Conventions, they issue to their armed forces as instructions which are to be obeyed as punctiliously as other stipulations of military law.

It might well seem that the Axis powers, with their emphasis upon the paramountcy of the soldier's duty of obedience, and with their scorn for the restraints of law, would not qualify in any way the binding character of the superior officer's orders. An examination of the military penal codes of our enemies, however, indicates that this qualification does exist at least in theory. In all cases exceptions to the soldier's duty of absolute obedience are quite clear from either the military penal code or from authoritative commentary upon it. This surprising situation can largely be explained by the fact that the three Axis governments have deemed it most

expedient to continue in large measure the laws evolved when their countries were under the influence of the legal principles preponderant in the community of civilized states. But it was doubtless with lack of foresight that they took over from the past the particular legal principles which, applied to the issue of their own crimes, result in their condemning themselves by their own law.

The pertinent article of the German military penal code is article 47, which has been a traditional feature of German military law and which, with only a slight and irrelevant change, was restated by the Nazis in the Militärstrafgesetz promulgated as recently as October 10, 1940. The substantive portions of the article read as follows:

> If, in the execution of an order in service matters, a penal law is violated, the commanding superior is alone responsible. However, the penalty attaches to the obeying subordinate as accessory:
>
> 1. if he has exceeded the given command, or
>
> 2. if it was known to him, that the order of the superior entailed an act which purposed a civil or military crime or misdemeanor.

Thus there are two exceptions to the soldier's guiltlessness in following superior orders. The second alone comes into question here since the first does not touch upon the obeying of a command but rather the exceeding of its terms. The article states only that the subordinate carrying out an unlawful order will be punished but its meaning as regards the question of obedience is quite clear. It is obvious that, if the subordinate is punishable for obeying an unlawful order, he is not required to obey an unlawful order. Martin Rittau, Editor of the Militärstrafgesetzbuch (1941) states that article 47 formulates one of the exceptional occasions when "the duty of obedience ... is to lapse for the subordinate." Another occasion, according to Rittau, is the command which, having nothing to do with service matters, offends so deeply the legal conscience of the subordinate that he cannot, in weighing the matter from all points of view, bring himself to obey it. (Pp. 100-01; cf. also M. E. Mayer, Deutsches Militärstrafrecht, 1907, I, 117.) K. L. Dams, in his work Der Militärische Ungehorsam (Berlin, 1938), interprets the second exception of article 47 as stipulating that, if the conditions it specifies are at hand, "the command is not binding." (P. 38.) Certain generally accepted qualifications of the exception must, indeed, be noted. It is not enough that the subordinate have doubt regarding the lawfulness of the command; he must be certain that it is unlawful. Also, it is not sufficient that the subordinate recognize that the order would result in the commission of an unlawful act; he must recognize that an unlawful act was actually purposed by the command. Subject to these qualifications it is, however, established that unlawful commands to military subordinates are not binding. Not merely the commentators but also decisions of the Reichskriegsgerichte attest to this principle. (Cf. Rittau, p. 101.)

That the violation of the common law of warfare is among the unlawful acts which cannot be made a binding order is sufficiently clear from the fact that Germany ratified the Hague Conventions. But if we may regard the present German Government as recognizing the validity of those portions of the Weimar Constitution which have not been repealed, the laws of land warfare also come into a binding force in German law through article 4: "The generally recognized rules of International Law are valid as binding constituent parts of the Law of the German Reich."

The Italian Military Penal Code, issued 6 May 1941, is substantially the same as the German in regard to the responsibility of the subordinate for unlawful orders. Article 40 of the code for peace, which applies to war also except where a contrary provision appears in the code for war, qualifies as follows the stipulation that the commanding officer giving an unlawful order is alone responsible for the penalty attaching to it: "In the case envisaged by the preceding paragraph, responsibility is lodged also in the soldier who has executed the order when the fulfilment of the order manifestly constitutes a crime." In a commentary of 1937 entitled Instituzioni di Dirrito Penale Militare, Gaetano Sucato, attached to the Italian military courts, interprets the Italian military law with respect to the issue of obedience. He declares: "The expression 'absolute obedience' should necessarily be limited by the legitimacy of the given order, which, if it should be manifestly criminal, would not impose upon the subordinate the obligation of executing it." (P. 255.) He observes further that this principle was affirmed by the supreme military tribunal in its decision of December 3, 1935, in the case of Bitetti. The court placed in clear relief the fact that the principle of obedience, although inherent in the soldier's duties, "cannot lead to the conclusion that the military legal system has as fundamental principle a passive obedience unlimited to such a point that the subordinate should unconditionally carry out the order to commit a crime." (P. 255.) Even more clearly than the German code the Italian military penal law includes under crime the violation of the rules of land warfare. For the rules of land warfare, usually issued to armies as a separate body of instructions, are in this case incorporated in the military penal law applying to war. (Bk. I, Title 4.)

Of all the Axis governments Japan, by reason of its fanaticism in matters of military discipline, would seem the least likely to give its soldiers discretion with regard to any kind of military order. It is true, indeed, that its military penal code, promulgated 10 April 1908, treats the question of disobedience without making explicit any exceptions for the severe punishments which are attached. There is, however, one stipulation which makes it plain that no absolute duty of obedience is expected of the soldier, if only because, carried to an extreme, the principle would justify the soldier who obeys his commander's order to participate in rebellion. In the section on "The Crime of Rebellion" severest punishment is provided for those who have led or participated in rebellion deliberately. But the article proceeds to state that "those who have followed blindly are to be punished by less than five years of imprisonment." Those who have followed blindly are evidently the soldiers whose only offense consists in having followed the unlawful orders of their superiors.

The culpability of obeying an order to rebel was attested, at least by implication, in the decision of the Tokyo military tribunal which tried the participants in the army rebellion of 26 February 1936. The decision, as reported in the Japan Advertiser's summary (8 July 1936) of a War Department communiqué, did treat superior orders as warranting clemency because of the emphasis of Japanese military training upon the soldier's duty of obedience. But it did not treat superior orders as a defense which had any weight by virtue of Japanese law. The decision, speaking of some of the non-commissioned officers and privates who had been found guilty, stated that they were to receive probation "in recognition of the fact that they acted against their wishes, forced by the power of circumstances, but obeyed the orders of their superiors in accordance with the precepts of their training and have since given evidence of their repentance." The issue of superior orders was touched on even more revealingly in the portion of the communiqué referring to a number of privates who were acquitted. The Advertiser stated: "As for the rest of the participating privates, they were acquitted because they acted on the conviction that the orders of their superiors should be obeyed unconditionally, the communiqué concluded." One observes that, though this assumption was considered a ground for acquittal, the communiqué refrained from asserting that it was legally correct but, on the contrary, by its very language indicated that the assumption of the soldiers was incorrect. The communiqué based its decision upon the military penal code of 10 April 1908, to which references was made above.

It might, indeed, be held that rebellion is a case sui generis and one that therefore does not warrant any generalization about the question of unlawful orders. At the same time it cannot be maintained that the silence of the military penal code on the question as a whole precludes the existence in Japanese law of the same doctrine that has been found in German and Italian law. Such a doctrine could have entered Japanese law through the decisions of the military courts, elaborating the meaning of the military penal code by judicial application. There is indeed strong evidence to this effect, although unfortunately the decisions of the military courts are not available. Patsukichi Minobe, considered one of Japan's foremost legal authorities (although discredited domestically so far as concerns his liberal interpretation of the constitutional status of the Japanese Emperor) has characterized unequivocally Japanese military law on the issue of unlawful superior orders. In his Gyosciho Tatsuyo, a treatise on administrative law published at Tokyo in 1940, he writes:

> Of course a soldier has no responsibility for obedience in connection with commands which are entirely invalid, and the soldier himself has the responsibility for determining whether the command is valid or invalid ... (II, 711.)

These words, together with the other evidence mentioned, seem to justify the tentative assumption that the Japanese doctrine is the same as that of Germany and Italy in absolving the subordinate from the duty of obedience to manifestly unlawful orders, except that, as Minobe states, the Japanese soldier is not punished if he decides to obey such orders. It needs only to be added that Japan too has subscribed to the Hague conventions (with the qualification that like Germany she made a reservation in 1907 to article 44) and that the provisions of these conventions are included in her army's manual of instructions on the rules and regulations of land warfare. (Cf. the Cyclopedeia of National Defense, 1934.)

If, then, the Axis governments do not require of their soldiers obedience to manifestly unlawful orders, what consideration may Axis war criminals claim on the ground of the Anglo-American doctrine of immunity through superior orders? This question does not presuppose that our military tribunals will apply the military law of our enemies but merely that this law may provide the answer to an issue of fact that our tribunals must take into account. Can a soldier of the Axis nations claim in any reasonable sense that he was acting under superior orders when he obeyed an order which his own military code enjoined or allowed him to disregard? If superior orders are to be construed as merely the orders of some immediate superior the legal situation is not changed by the fact that these orders were unlawful and therefore unbinding. But this narrow interpretation conflicts with the established principle that laws should be construed in such a manner as to give realization to their intent and underlying principle, more particularly when they are ambiguous or fail to envisage all the significant variations of possible circumstances. Nothing is clearer than that the Anglo-American superior-orders doctrine was intended to do justice to the soldier who is under duress in the sense that if he does not follow an unlawful order he will be punished. It is, in other words, an application to the issue of warfare of the doctrine of some jurists in municipal law that overwhelming duress excuses crime; if this doctrine never became established in municipal law, the recognition of the soldier's duty of obedience led Anglo-American military authorities to believe that it was valid in the laws of warfare. But where the soldier has no duty of obedience but rather a duty of disobedience the Anglo-American doctrine scarcely covers the case. The soldier is not placed under duress by an unlawful order which he is allowed by his own system of military law to disobey without fear of punishment. In all reason, the commander to whom the Anglo-American doctrine refers without definition cannot be merely the individual superior considered in detachment from the hierarchy of the army and from its system of law. It can only be the individual commander acting as the representative of an army as organization and as legal system. The absurdity of any other interpretation will be brought home if one merely asks whether a tribunal applying the Anglo-American doctrine would excuse a soldier who, though knowing that his commanding general had given orders against such crimes, obeyed the sergeant who commanded him to violate a law of warfare.

Of course, the question whether a particular soldier should be punished for a war crime cannot in any case be determined apart from the actual circumstances. It must be shown, in the first place, that he could not but have known the measure to be a crime. This fact is well illustrated in the decision of the German Supreme Court in the case of the torpedoed British hospital ship, Dover Castle, rendered 4 June 1921, in pursuance of Germany's agreement to try cases of war crimes presented by the Allies. The Court recognized the exception which article 47 of the German military penal code makes to the general proposition that the superior giving the unlawful order is alone responsible. It pointed out, however, that if the subordinate is also to be penalized it must be on condition that, as the article states, he be aware of the illegality of the order. In this case the German submarine commander followed orders which, according to the Court, he could not have been expected to recognize as unlawful; he had at hand the allegation of the German Admiralty that the British were misusing hospital ships and had no reason to doubt the correctness of the Admiralty's statement that this misuse justified the

torpedoing which it ordered. (A.J.I.L., XVI, 707.) In the second place, an offender against the laws of warfare would seem exculpated by the superior-orders doctrine if he could prove that, regardless of the theory of his military penal code, he was not in a position to disobey the unlawful order or even to protest against it without incurring punishment. It must be anticipated that some prosecutions of war crimes will founder for either or both the reasons cited.

But the likelihood of difficulties is diminished by the nature of the current offenses as well as by the policy to which the United States and Great Britain have committed themselves in regard to war crimes. The principal Axis malpractices are the most heinous and therefore the most clearly recognizable of the war crimes. At the same time it is the declared policy of this nation and of Great Britain not to prosecute the masses but only the ringleaders. This is to say that in general there will be prosecution only of high-ranking political and military authorities who were in a position not merely to know that the orders given them were criminal but also to protest, at least, such orders.

In conclusion, it should be repeated that the complete elimination from the American and British manuals of the superorders doctrine would be the most clean-cut solution of the difficulty. A second-best expedient would be its amendment by the statement that it is inapplicable where the military penal code of the offender's army does not require the execution of manifestly unlawful orders. This amplification would merely make explicit what is implicit in the doctrine itself. Finally, if no change whatsoever is to be made in the manuals, it may suffice that those charged with the prosecution of war criminals be acquainted with the provisions in the Axis military penal codes which deprive the plea of superior orders of legal justification. Moreover, these provisions and their legal consequences should be brought into light no matter what type of judicial procedure for war criminals is determined upon. While the superior-orders doctrine has been considered an obstacle to conviction only in connection with the military tribunal, yet, in any type of court of system of law, a mistaken idea about the degree of duress to which the offender was subject may have an unwarranted deterrent influence in the determination of the punishment.

If, then, condign punishment is to be assured it is important that those charged with the prosecution or the adjudication of Axis war criminals should be well aware that, in consequence of the military penal codes of the Axis countries, those who were ordered to commit war crimes were obligated or at liberty to disregard the unlawful orders and were legally assured of immunity from punishment in so doing.

IV. THE LEGAL GROUNDS FOR THE PUNISHMENT OF GERMAN PRACTICES IN REGARD TO HOSTAGES AND COLLECTIVE PENALTIES

A difficulty which those preparing judicial proceedings against Axis war criminals can scarcely ignore is the extreme complexity of some of the legal issues which the prospective charges against them will raise. Certain of the Axis atrocities, such as brutalities or pilferings practiced upon the unoffending, violate indisputably the Hague prohibitions against taking the life or property of non-combatants. But there are other malpractices which, however shocking they may be morally, are by no means easily subsumed under the class of offenses which are made punishable by the technical criteria of the laws of warfare. The laws of warfare are formulated with a view not only to making war as humane as possible but also to preserving for military authorities the liberty of taking severe measures to compel the enemy to abandon unlawful acts dangerous to the security of an army or territory. In other words, certain severities and injustices, though illegal in themselves, receive in some circumstances the sanction of law by virtue of the principle in international law which is known as the right of taking reprisals.

It so happens that the malpractices which the Axis nations have engaged in most systematically, and which have been the chief burden of the complaints against them, are just those which it is most difficult to impugn legally. These ruthless and inequitable practices are the execution of hostages and the imposition of collective penalties in reprisal for the killing of Axis officials or for other acts of resistance in Axis-occupied territory. President Roosevelt in his statement of 25 October 1941, pointing towards the punishment of war criminals, excoriated both these practices:

> The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized peoples long ago adopted the basic principle that no man should be punished for the deed of another.

The principle mentioned by the President is, however, adopted in an absolute form only in municipal law, while in the laws of warfare it is accepted only in a limited degree, subject to the absence of overwhelming considerations of security requiring its abandonment in reprisal. As will be shown, even the current American Field Manual of the Rules of Land Warfare, FM 27-10, allows reprisals against the innocent in such circumstances and includes among justifiable reprisals the execution of hostages. In taking this position the authors of the Manual merely followed their duty of objectively setting forth international law as they saw it. The liberties allowed by international law under the principle of reprisals evolved into custom at a time when the existence of governments and armies disposed to take systematic and extreme advantage of them was not foreseen. Especially after the German atrocities of the Franco-Prussian War, jurists increasingly endeavored to circumscribe the rights of reprisal (as in the Manual of the Institute of International Law, 1880, arts. 85, 86), but military authorities have often been inclined in controversial legal issues to align themselves on the side which is the more favorable to military

security. In view of the consequent latitude of military interpretations of the rights of war, many today hold that it is best to try war criminals not before military tribunals but rather before a new type of tribunal which would render judgment on the basis of what may be called the laws of humanity. (Cf. Sheldon Glueck, Free World, Nov. 1942, pp. 138-46.)

This course, however, would entail the disadvantage of abandoning the existent military tribunals, which are able to act with greatest dispatch and proximity to the scene, and of undertaking the procedural and political difficulties of setting up an unprecedented type of international tribunal. Such an innovation would, moreover, encounter the traditional Anglo-American prepossession against imposing penalties on the basis of ex post facto legislation. This feeling manifested itself in the objections of the American representatives to the proposal, favored by the other members of the Commission on Enforcement of Penalties appointed by the Preliminary Peace Conference of Versailles, that the Kaiser be tried by an international political tribunal. All in all, it seems that the abandonment of positive law, which none of the American or British policy declarations on the issue have envisaged, would not be wise unless it becomes quite clear on painstaking examination that the laws of warfare utterly preclude in this case the punishment which they were designed to effect.

The following inquiry seeks to demonstrate that the legal difficulty of convicting Axis war criminals for the execution of hostages and the imposition of collective penalties is not insuperable. It is not to be denied that the precedents and the opinions on the issues are conflicting, but there are few large issues in international law where there does not exist more or less conflict. The case against war criminals will not depend upon an absolute consensus but only upon a clear preponderance of precedents and juristic opinions. In this question the doctrine stated in our own manual has no other significance than that of an especially weighty opinion among numerous others, and, if it is proved incorrect, this manual could and should be revised. The contrary opinions appear to be sufficiently numerous, authoritative, and well-founded to outweigh it. Yet we may begin by observing that even the American doctrine, carefully considered, has qualifications which rule out the contention that all the German practices regarding hostages and collective penalties receive its sanction.

The American manual considers both the hostage issue and the collective-punishments question in the same paragraph (358), concerning reprisals, "an unavoidable last resort to induce the enemy to desist from illegitimate practices." The words which justify the execution of hostages follow the proposition that the offending forces or populations generally may lawfully be subjected to appropriate reprisals. In amplification of this proposition it is stated: "Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed." One qualification, however, is that, as the Manual adds, "reprisals against prisoners of war are expressly forbidden by the Geneva Convention of 1929." This rule by implication outlaws the shackling of prisoners to which Germany, though, later, Great Britain and Canada also, resorted after the Dieppe raid. But there is implicit a general qualification also -- that hostages

may be executed only if they have been taken and held for the declared purpose of insuring against unlawful acts. In other words, those executions which German authorities have ordered without giving warning to the population of the purpose for which hostages were taken were contrary to law. Still another qualification is the following: "The rule requiring careful inquiry into the real occurrence will always be followed unless the safety of the troops requires immediate drastic action and the persons who actually committed the offense cannot be ascertained." On the face of the reports it does not appear that German authorities have usually avoided the execution of hostages until a reasonable effort to ascertain the actual offenders had been made. As Mr. Arthur Kuhn has pointed out in an article on "The Execution of Hostages" in the American Journal of International Law, the German practice with hostages has departed from the sphere of prophylactic reprisals and deteriorated into that of systematic terror. (XXXVI (1942), 273-74.)

On the other hand, in a court of law the individual commander's plea that the safety of his troops required immediate drastic action would be difficult to overthrow; like self-defense as an excuse for what seems aggression, it is often incontrovertible from the point of view of law even when unconvincing from that of common sense. Thus the prosecution of war criminals would be upon safe ground only if, as now it will be undertaken to show, it is possible to hold that the laws of warfare forbid the execution of hostages unconditionally.

There is, to be sure, no international convention on the laws of warfare which formulates such a prohibition directly; even the Hague conventions are silent on the issue. On the other hand, customary international law of modern times, as represented in both practice and the opinions of publicists, presents but little in support of the position of FM 27-10 and a great deal against it. It is significant that neither the United States Army "Instructions" of 24 April 1863, nor the 1914 edition of the American Manual of the Rules of Land Warfare, sanctioned the killing of hostages even though the practice was not explicitly condemned. On this issue the current American Manual also does not follow the precedent of the British Manual. Paragraph 461 of the British official guide Land Warfare, prepared by Edmonds and Oppenheim in 1912, stated in reference to the former practice of taking hostages as pledges for the fulfilment of agreements, that "if hostages are nowadays taken at all they have to suffer captivity, and not death, in case the enemy violates the agreements in question." The taking of hostages to ensure the proper treatment of the sick and wounded is declared to be legal but without mention of possible execution (par. 464). The British Manual of Military Law, issued in 1914 and 1929, is to the same effect. An even stricter view is taken by the French Manual, article 92 of which prohibits the demanding or taking of hostages for the purpose of ensuring the carrying out of certain arrangements, and makes no mention of the use of the institution for any other purpose. Only the German Manual, Kriegsbrauch im Landkriege, published in 1902, maintains (p. 48) the legality of the use of hostages as a means of preventing the commission of unlawful acts by civilians in occupied territory.

The facts as regards practice in modern times are of a corresponding character. J. W. Garner, discussing the execution

of hostages in the First World War, declares that "before the recent war there appears to have been no instances in which this extreme punishment was resorted to, although during the Franco-German war of 1870-71 the Germans several times threatened to shoot hostages taken by them in case their orders were not complied with." (International Law and the Great War, 1920, I, 309). In the First World War it was the Germans alone who not merely threatened but carried out the shooting of hostages in reprisal against the population of occupied territory. This offense was a major item in the denunciation of German atrocities during the war, and at its close the Allied Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties included in its list of German war crimes both the execution of hostages and the infliction of collective penalties. In the current war only the Axis nations have resorted to these malpractices; for the first time Germany has not stood alone in them, being imitated by Italy (cf. Inter-Allied Review, 15 September 1942, p. 332) and, at least in the treatment of the Chinese, by Japan as well.

In an issue upon which international conventions are silent, the opinions of publicists, as well as the manuals and the practices of armies, must have weight. Dr. Benjamin Akzin has written that "the deliberate execution of hostages by military forces is expressly rejected by most authoritative writers." (Library of Congress, Legislative Reference Service, International Law, JX 2001, p. 4.) Among those who accept it -some, like G. F. de Martens (Précis du droit de gens moderne de l'Europe, 1864, sect. 296) limit the practice to punishment for the hostage's own crimes and the imposition of reprisals. Others are influenced by German practice as is the British publicist, J. M. Spaight (War Rights on Land, 1911, p. 406); after citing German policy in the Franco-Prussian War, he merely asserts that the illegality of executing hostages cannot be maintained dogmatically. While some German publicists have taken a contrary position, most of the writers who approve the execution of hostages are German, such as Ernst Vanselow (Völkerrecht, 1931, sect. 202 a). Another German jurist who sees the execution of hostages as legal is Ascan Lutteroth (Der Geisel im Rechtsleben, 1922, pp. 263-64), but he immediately adds that he is "well aware that he thereby places himself in opposition to the majority of publicists in international law, and that even those who do not expressly disapprove the killing of hostages never explicitly approve it."

The school disapproving the execution of hostages stem from Victoria (quoted by Percy Bordwell, The Law of War between Belligerents, p. 27) and from Vattel (The Law of Nations, bk. II, chap. XVI, sect. 246); Grotius, like the others, declares that the practice is against moral justice but concedes its conformity with the strict law of nations (On the Law of War and Peace, bk. II, chap. XX, sect. LIII). The older writers, however, knew of the institution only in the form of taking hostages for the observance of treaties or agreements. The modern publicists, considering the question of retaliation upon the population of occupied territory, base their opposition in part upon the same principle of justice as was invoked by the older jurists. Herein they are supported also by the Preamble of the Hague Convention of 1907 on the laws of land warfare:

> Until a more complete code of the laws of war has been issued, the High Contracting

> Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.

Typical of the appeal to usage are the words of Hall in reference to hostages: "Under a usage which has long become obligatory it is forbidden to take their lives except during an attempt to escape ..." (International Law, 1924 ed., p. 500.) Oppenheim, usually followed by the American Manual, writes to the same effect. (International Law, 1940 ed., sect. 170.) An example of appeal to the laws of humanity is the statement of Arthur K. Kuhn that the execution of hostages "violates the most elementary conceptions of justice and humanity." (Op. cit., p. 273.) In support of this position is the restriction of the right of reprisals adopted by the Institute of International Law and stated in article 85 of the Oxford Manual: Reprisals "must in all cases take account of the laws of humanity and morality." Among other publicists who regard the execution of hostages as illegal are the following: Bonfils, H. (Manuel de droit international public, 1914, sects. 1145, 1151); Fiore, P. (Nouveau droit international public, 1886 ed., III, 183-84; Guelle, J., Précis des lois de la guerre sur terre, 1884, II, 50-55; Heffter, A. W., (Das europäische Völkerrecht der Gegenwart, 1881, p. 207); Hershey, A. S. (The Essentials of International Public Law, 1927, p. 411); Kunz, J. L. (Kriegsrecht und Neutralitätsrecht, 1935, p. 78); Martens, F. de, Traité de droit international, 1887, III, sect. 119; Phillipson, C., International Law and the Great War, 1915, p. 241; Pillet, A. (Les lois actuelles de la guerre, 1901, pp. 212-13); Westlake, John (International Law, 1907, II, 104).

In addition to the reasonings ascribed in the foregoing to the publicists, there is an important argument against the execution of hostages which rests upon a recent international convention. This is the Geneva Prisoners of War Convention of 1929, ratified by Germany and Italy and accepted by Japan for the present war by express declaration. Article 2 declares with reference to prisoners of war that "measures of reprisal against them are forbidden." Hostages are not, indeed, prisoners of war. But it has long been an established principle of customary international law that hostages should receive the same treatment as prisoners of war. Francis Lieber's "Instructions for the Government of Armies of the United States in the Field," issued April 24, 1863, states this principle in article 55. The current American Manual, like that of 1914, adheres to the same view, stating that "when a hostage is accepted he is treated as a prisoner of war." (Art. 359.) Lutteroth speaks correctly with reference to the publicists as well as the official manuals of the rules of land warfare when he writes that "there is consensus in international law that the treatment of hostages must correspond to that of prisoners of war." (Op. cit., p. 257.) It is difficult to escape the conclusion that, with this major premise, and the minor premise that prisoners of war cannot suffer reprisals, hostages too may not lawfully be the objects of retaliation. If the objection be raised that the purpose

of taking hostages would disappear if all reprisals are prohibited, the answer is twofold. First, the original purpose of taking hostages was not to be in a position to inflict injuries upon them but rather to hold their freedom in pledge for the fulfillment of agreements; the deprivation of liberty was considered a sufficient deterrent in itself. Similarly, it is possible to conceive that hostages should not be retained for the entire duration of a military occupation but only as long as unlawful acts do not cease or the true offenders are not caught. The deterrent in this case would be the detention of individuals as hostages rather than further punishment imposed in the course of their detention. In the second place, whether or not this deterrent would be adequate, it is not permissible to argue the validity of a legal proposition in terms of its good or bad military effects but merely in terms of its legal correctness. It may, however, be noted incidentally that at one time the renunciation of all rights of reprisal against prisoners of war would have seemed as impracticable and dangerous as some today hold the outlawing of reprisals against hostages.

The demonstration of the illegality of executing hostages by no means disposes of the question of collective penalties. The two issues have in common, however, the fact that in both cases punishment is inflicted upon the innocent. For in so far as it is controversial the question of collective penalties does not envisage the punishment of a group for a crime of which every member of the group has been guilty, but rather the punishment of a community or larger population for a crime of which only several or even one of them have been guilty. Another common feature is that in both cases the punishment is imposed as a form of reprisal. The principal difference is that, whereas hostages are a select group of a community, taken under threat of punishment should certain unlawful deeds occur, those suffering collective penalties are not detained and proceeded against until after an unlawful act has taken place. Collective punishments have been resorted to not only for violations of the laws of warfare but also for breaches of the occupant's own law. In the past collective punishment was usually not imposed except when the guilty could not be found; the Polish White Book, however, accuses the Germans of disregarding this limitation. The most frequent form of collective punishment is the fine, but the destruction of community property has been resorted to in the case of the more serious offenses. Lidice exemplifies collective punishment in its extreme form -- the destruction of an entire town accompanied by the execution of all males over 17 and the dispersal of all other inhabitants.

In the present status of international law the only question regarding the legitimacy of collective penalties concerns their imposition as a reprisal. That is, it is clearly established that collective penalties may not be imposed for purely individual crimes but there is no consensus that they are illegal as reprisals (to be defined precisely in the course of our discussion). Typical of the school which sanctions collective penalties as reprisals is the American Manual of the Rules of Land Warfare, which, in both 1914 (par. 386) and 1940 (par. 358), stated under the heading of reprisals the following:

> Villages or houses, etc., may be burned for acts of hostility committed from them, where the guilty individuals cannot be identified, tried, and punished. Collective punishments may be inflicted either in the form of fines or otherwise.

The British Manual of Military Law, in the edition of 1929 as also of 1914 (par. 458) is to the same effect. British military practice, as in the Boer War, is not without instances of pecuniary collective punishments. It is only Germany, however, which has systematically extended collective penalties beyond the relatively mild form of the fine; it had already done so in the Franco-Prussian War and the First World War but its practice in the present war has involved severe punishments far more frequently than in the past. Once one admits the principle of collective penalties in any form it is difficult, theoretically, to limit the extent to which it may be taken.

The legal argument against collective penalties is different from that against executing hostages in that the former practice is touched upon directly by an international convention. The Hague Convention of 1899 on the laws and customs of land warfare legislated for the issue of collective penalties in article 50, which was repeated in the convention of 1907. Article 50 reads as follows:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible.

This rule might seem to settle the issue, but there is some doubt, for a reason which will be cited later, as to whether it was intended to rule out collective penalties imposed as reprisals.

Among the juristic declarations which reflect the view that the rule did not rule out such penalties are those of the American Manual of the Rules of Land Warfare. Both the 1914 and the 1940 editions incorporated the Hague article 50 but they appended to it the statement that the rule did not preclude reprisals. To quote the 1940 edition (par. 344):

> Reprisals by the occupant for violations of the laws of war or breach of the occupant's proclamations or regulations by enemy individuals not belonging to the armed forces are not prohibited by the above article. (See par. 358.)

The view that the Hague article 50 does not rule out reprisals has as its basis an observation in the report to the Hague Conference of 1899 by M. Rolin, reporting for the Second Commission on the Laws and Customs of War on Land. Rolin therein states that the proposals of the Commission were arrived at "without prejudging the question of reprisals." (Report to the Hague Conferences of 1899 and 1907, ed. Scott, p. 152.) This qualification was accepted by the presiding officer of the Hague Conference as authoritative although its meaning was not further defined. Apparently in pursuance of Rolin's observations Oppenheim comments upon article 50 as follows:

> It must, however, be especially observed that this rule unfortunately does not at all prevent reprisals by an occupant in case acts of illegitimate warfare are committed by enemy individuals not belonging to the armed forces, although in

> practice innocent individuals are thereby punished for illegal acts for which they are neither legally nor morally responsible. For instance, a village is burned by way of reprisal for a treacherous attack committed there on enemy soldiers by some unknown individuals. (International Law, 1940 ed., sect. 170.)

Probably this passage in Oppenheim, whom the authors of the American Manual also took as a model on the issue of superior orders, was responsible in large part for the position which they adopted regarding collective penalties. (Cf. for a similar view T. E. Holland, The Laws of War on Land, 1908, p. 55; Spaight, op.cit., p. 408.)

Before considering whether Oppenheim interprets article 50 correctly, it should be noted that, even assuming his interpretation to be correct, it by no means gives as much latitude to collective penalties as might at first appear. The term "reprisal" has in international law a signification which is more limited than in popular parlance and which by no means covers any act of retaliation by one belligerent against an offense committed by a member of the enemy. This legal concept is defined by Oppenheim in the following words: "Reprisals are such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency." (Sect. 33.) From this definition it appears that a reprisal is to be spoken of only when there is a retaliation for an international delinquency. An international delinquency is sharply to be distinguished from the offense of a private individual as such. Oppenheim makes this fact clear in the following words:

> Reprisals are admissible solely and exclusively in the case of international delinquencies. As internationally injurious acts on the part of administrative and judicial officials, armed forces, and private individuals, are not ipso facto international delinquencies, no reprisals for them are admissible if their State discharges the obligations of its vicarious responsibility. However, should it refuse to do so, its vicarious responsibility would turn into original responsibility, and thereby an international delinquency would be created, for which reprisals are indeed admissible. (Sect. 36.)

Thus it follows from Oppenheim's words that not every unlawful deed by civilians of an occupied territory can justify reprisals. Strupp, similarly, declares that not the acts of private individuals but only the illegal action of a state can give ground for reprisals. (Wörterbuch des Völkerrechts, II, 350.) With specific reference to the question of collective punishment, Robert Roth, in his work Die Repressalie (1918), asserts that "article 50 does not come into consideration for true war reprisals, because these are not imposed because of the actions of private persons as such, but because of a breach

of international law which has been committed by an organ of an enemy state and for which the enemy state bears the responsibility." (Pp. 29-30.) It is, then, the implication of this theory of reprisals that the imposition of collective punishment upon a generally innocent population is justified only when the enemy state or its local organ has committed or countenanced a breach of the laws of warfare. In such a case the prohibition of the Hague article 50 is not held binding because, as it is assumed, the article does not forbid reprisals. In all other cases, however, the offenses of individuals cannot warrant punishment; they are regarded only as the offenses of private individuals and the prohibition of article 50 comes into play.

But if it be taken that article 50 allows all collective penalties that are reprisals so wide an opening is left for the punishment of the innocent that it is doubtful whether the article accomplishes any substantial purpose. Merely by alleging a prior unlawful act by the enemy state -- whether in the occupied territory or elsewhere --- the occupant can impose a collective penalty whenever he wishes to do so. Such is the difficulty which leads T. J. Lawrence to dispute the theory of Oppenheim and others that article 50 applies only to the cases where the question of reprisals does not arise. He declares that "if this view is correct, the commander of an occupying force is free to inflict any kind of severity on a district he has overrun, if only he bethinks himself of saying that it is done by way of reprisal." (The Principles of International Law, sect. 180.) The editor of Lawrence's book, P. H. Winfield, interposes the comment that the prohibition of article 50 is unqualified whether one calls the forbidden punishment a reprisal or not. If there is no qualificiation in the words of the article there is also none in the statement of Rolin's authoritative commentary that "acts that are strictly those of individuals could never give rise to collective punishment by the collection of extraordinary contributions." It is true that, in proceeding to state the applicability of the rule to all collective penalties, Rolin does interject the words "without prejudging the question of reprisals." These, however, are not the words which one would be likely to use if the intention were to allow collective punishments as reprisals. They are words which most probably would be used to make it clear that reprisals other than that specified in the article were left in the same legal status as before. All reprisals involve a punishment of the innocent together with the guilty but apparently the conferees at The Hague, like those at Brussels previously, did not wish to take the responsibility of either prohibiting all of them explicitly or of allowing the prohibition of a single form of reprisal to be interpreted as an implicit prohibition of reprisals in general.

At the most, however, the words of Rolin could mean only that reprisals in the form of collective penalties were not to be judged either lawful or unlawful on the basis of article 50 in itself. Consequently it would be necessary to judge these reprisals in the light of customary international law, independently of article 50. In his detailed essay on the subject Garner does condemn the theory of collective responsibility applied by Germany as being contrary not only to "the interpretation of Article 50 of the Hague Convention which has been given it by the great majority of recent writers on international law" but also as being out of accord with "the well established principles of modern criminal law." (Op. cit., p. 535.) Further, speaking of commentary on German practice

in the Franco-Prussian War, when customary international law alone was the criterion, he observes: "The great majority of American, English and French writers on international law have condemned as arbitrary and contrary to the elementary principles of justice the theory of collective responsibility as it was applied by the Germans in many instances during the war of 1870-71, particularly where it was applied to districts other than those in which the offense was committed, where the amount of the fine was out of all proportion to the gravity of the offense, where the acts complained of were committed not by the civil population but by the regular troops of the enemy, as appears to have sometimes been the case, and where the fines levied were imposed for the psychological purpose of inducing the population to cease their resistance and sue for peace." (Ibid., pp. 525-26; cf. also the bibliographical footnotes, pp. 526 ff.) Among those writing before article 50 had come into existence, Bluntschli was notable in condemning collective punishment except where the population as a whole had facilitated the crime or, having it in its power to prevent it, did not do so. (Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 1874, sect. 643.) So too Calvo wrote that it was scarcely permissible that communities should be held responsible for the individual acts of their inhabitants, and still less for those of strange persons, who, without authority and without mandate, might come there to commit acts hostile to the troops of occupation. (Le droit international, 1896, IV, 216.) Even more emphatically F. F. de Martens condemned the entire theory of collective responsibility and expressed the hope that it would ultimately disappear from warfare. (Traité de droit international, 1887, III, 265.) Even after the prohibition introduced by article 50, certain jurists based their condemnation primarily upon principles of justice ascribed to customary international law. Thus Henry Bonfils wrote in 1914 that penalties imposed during war "should only fall upon the guilty person and his accomplices" because it was iniquitous that punishment should be inflicted upon the innocent. (Le droit international public, sect. 1224.) From the same point of view A. Merignhac impugned as odious and abominable a doctrine of collective responsibility which resulted in the execution of innocent individuals. (Les lois et coutumes de la guerre sur terre, 1903, p. 217.)

It remains to emphasize that none of the critics of the doctrine of collective responsibility deny the justice of applying it in circumstances where a community can really be considered to have shared in the responsibility for a crime. The question of what those circumstances are has evoked much discussion. No standard is supplied by article 50 itself and the commentary of Rolin states only that "in order to inflict a penalty on the whole community there must exist as a basis therefore at the very least a passive responsibility therefor on the part of the community." (Op. cit., p. 152.) There are a few jurists, most of them German, who seek to nullify the article by assuming that there is a passive responsibility of the community for every individual crime which occurs within its territorial jurisdiction. (Cf. Robert Roth, Die Repressalie, 1918, pp. 29-30.) According to this theory, article 50 was designed only to preclude collective punishments such as the Germans sometimes imposed in the War of 1870-71 -- penalties upon the community where the offender was born, which could not possibly have prevented the offense. Roth argues that the community in which the crime takes place has the legal duty of preventing it and, by failing to do so, incurs passive responsibility in the sense of article 50. It is difficult, however,

to see justice or reason in so broad a construction of passive responsibility, or to believe that the Hague conferees intended a construction which results in making communities responsible for all crimes of individuals in their midst. Even Albert Zorn, who believes that communities are responsible for all practicable measures to prevent crimes, concedes that if proof can be given that everything possible has been done there can be no collective penalty for a crime which nevertheless takes place. (Das Kriegsrecht zu Lande in seiner neuesten Gestaltung, 1906, pp. 242-43.) Albéric Rolin denies even the validity of the contention that communities can be judged by the standards of prevention that prevail in peace; he points out that in warfare the communal facilities for preserving law and order have been largely impaired by the encroachments of the occupying army. (Le droit moderne de la guerre, 1920, I, 483.)

While the concept of passive responsibility involves a recognition of the duty of preventive measures, it is frequently emphasized that this duty must not be expanded beyond reasonable limits. Thus Garner maintains that "if the authorities have exercised reasonable diligence to prevent the act and if they have exerted themselves to discover and punish the actual perpetrators, it hardly seems reasonable or just to say that the community is really responsible." (Op. cit., pp. 529-30.) To do so would, he holds, presuppose that the public authorities are obliged to guarantee the perfect enforcement of the law -- something which no community has in fact ever been able to do. It seems to Garner especially unjust to hold the community responsible for crimes which, like those committed in remote areas, without knowledge of the authorities or even of the population, it could not possibly have prevented.

There are jurists who set little store by the vague concept of passive responsibility but rather emphasize active participation of the community as the prerequisite of collective responsibility. It is, however, admitted that communal participation can be inferred from certain suspicious circumstances. For example, Lawrence observes that should a conspiracy of silence baffle all attempts to discover the actual perpetrators of an outrage against occupying soldiers, few would venture to argue that the community had no collective responsibility. (Op. cit., sect. 180.) Ernest Nys is fairly typical of the Belgian and French schools of jurists in reducing collective responsibility to the narrowest possible range. He holds that collective responsibility exists only when the offense is imputable to all the inhabitants as in the case of public injuries to the occupying force, manifestations of revolt, or public opposition and resistance to an investigation. Nys denies even the right of the occupant to impose community fines for the acts of a few isolated individuals. He contends that the community as a whole must be guilty and that the military must prove this guilt. (Le droit international, III, 429.)

It is important to note in conclusion that the outlawing of the execution of hostages and the imposition of collective penalties would not rule out reprisals except within a limited sphere. Reprisals are excluded only in so far as they are aimed directly at innocent non-combatants, the protection of whom had become a principle of customary international law long before the Hague Conventions introduced definite stipulations in their behalf. The use of ordinarily illegitimate methods of warfare against the enemy armed forces -- and this surely is the most effective form of retaliation -- is left unimpugned. Even reprisals against the non-combatant population are not brought

into question as long as they are limited to offenses which, as the American Manual of 1914 states in its paragraph on collective punishments, "the community has committed or permitted to be committed." (Par. 386.) The burning of villages or houses for acts of hostility committed from them where the guilty individuals cannot be identified (declared lawful in the current Manual, par. 358 e) can be justified legally as an act of self-defense. The institution of taking hostages, although not of inflicting punishment upon those who are innocent, also remains among the lawful sanctions of warfare. There is no unlawfulness in executing in reprisal those hostages who can be proved to have participated in a violation of the laws of warfare but who would not have received the death penalty aside from the necessity for reprisals.

The changes in the American Manual which are called for if the foregoing considerations are correct are by no means extensive. Without going into all the details of revision we may indicate their general nature:

1. Paragraph 344 should be eliminated or changed to read that not all reprisals by the occupant are prohibited by the Hague rule 50.

2. Paragraph 358d on the subject of reprisals should not include the proposition that hostages may in certain circumstances be executed.

3. Paragraph 358e should be changed in its final sentence, regarding collective punishments, to the form of statement that appears in the Manual of 1914: "Collective punishments may be inflicted for such offenses as the community has committed or permitted to be committed."

There appears to be ample authority for these changes in the preponderant character of historic precedents and juristic opinions. But the alteration could well be reenforced by a general agreement among the United Nations with regard to the meaning of the laws of warfare which the forthcoming trials of Axis war criminals shall apply. To change the laws of warfare merely for the purpose of securing convictions seems unwarranted; to persist, however, in erroneous interpretations favorable to the accused is even more unwarranted. The tenets of the current American Manual on the issues of hostages and collective penalties would seriously prejudice the chances of convicting Axis war criminals under positive international law. Such questionable tenets should, it appears, be promptly eliminated together with similar doctrines in other manuals used among the United Nations armed forces.